

August 21, 2002

**Barbara A.
Schermerhorn
Clerk**

NOT FOR PUBLICATION
**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE RAYMOND GREGORY
CHAPMAN,

Debtor.

BAP No. NO-02-025

HEATHER A. DAVIS,

Plaintiff – Appellee,

v.

RAYMOND G. CHAPMAN,

Defendant – Appellant.

Bankr. No. 01-01185-R
Adv. No. 01-00284-M
Chapter 7

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Northern District of Oklahoma

Before McFEELEY, Chief Judge, PUSATERI, and BOULDEN, Bankruptcy Judges.

PUSATERI, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Debtor Raymond G. Chapman (“the Debtor”) appeals the bankruptcy court’s decision that an obligation imposed on him in state court child custody litigation to pay his ex-spouse’s attorney fees and costs is excepted by 11 U.S.C. § 523(a)(5) from his

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Chapter 7 discharge. After a careful review, we conclude that the bankruptcy court's decision must be affirmed.

Background

The relevant facts are these. The Debtor and appellee Heather A. Davis ("the Appellee") were divorced in 1994. Custody of the couple's daughter was awarded to the Appellee, and the Debtor was granted visitation rights. In May 1998, the Debtor sought a change of custody, and in August, the Appellee sought to limit the Debtor's visitation rights. In January 2000, the state court denied the Debtor's motion for change of custody and limited his visitation rights. A short time later, the Appellee sought an award of the attorney fees and costs she had incurred in the custody dispute. After a hearing, the state court granted the Appellee's request, ordering the Debtor to pay fees of \$5,000 and costs of \$1,857.20. A few months later, the Debtor filed for relief under Chapter 7 of the Bankruptcy Code.

The Appellee filed an adversary proceeding seeking a determination that the fees and costs awarded to her were nondischargeable child support under § 523(a)(5). The bankruptcy court granted her motion for summary judgment, and the Debtor timely appealed.

Discussion

We have two preliminary matters to attend to. The Appellee's counsel filed her opening appellate brief late and then filed a motion to permit the late filing, to which the Debtor objected. The Debtor filed a motion to dismiss the appeal that was granted, but then filed a motion to reconsider. In this motion, he explained that he had meant to ask to have the Appellee's case, not his appeal, dismissed because of the late-filed brief, meaning that he wanted her dischargeability complaint dismissed and his debt for attorney fees and costs discharged. The appeal was reinstated, but the motions were referred to this panel for resolution.

We believe that the Debtor misunderstands how this case changed when the

bankruptcy court ruled against him. While a party's failure to meet deadlines or otherwise properly participate in a case at the trial court level can sometimes result in a judgment against that party, once the trial court has entered judgment in favor of a party, that party has no obligation to defend against the opposing party's appeal, and the appellant is not entitled to have the judgment reversed or set aside simply because the party that won before the trial court does not participate in the appeal. An appellant can lose on appeal by failing to meet briefing deadlines, but an appellee cannot. This is so because to obtain appellate relief from a judgment, the appellant must show that the trial court made an error that needs to be corrected. The appellee's failure to appear in support of the judgment does not establish that the court made any error. For this reason, the Debtor's request that we strike the Appellee's opening brief and grant judgment in his favor is denied. In addition, although appellees should strive to abide by the deadlines, we are generally inclined to excuse the late filing of their briefs, at least when the delay is minimal, as it was in this case. The Appellee's motion to file her brief late is granted.

We turn now to the merits of the Debtor's appeal. The bankruptcy court thoroughly analyzed the law on the nondischargeability under § 523(a)(5) of debts imposed in post-divorce custody litigation for fees and costs, and correctly concluded that the Debtor's obligation to pay the Appellee's attorney fees and costs falls within the general rule of nondischargeability for such obligations that the Tenth Circuit announced in *Jones v. Jones (In re Jones)*.¹ The bankruptcy court also carefully compared the facts of this case to the facts involved in *Lowther v. Lowther (In re Lowther)*² and correctly determined that the Debtor's obligation does not come within the "unusual circumstances" exception to nondischargeability that was recognized in that case.

Appearing without the benefit of counsel, the Debtor contends that this court's

¹ 9 F.3d 878, 881-82 (10th Cir. 1993).

² 266 B.R. 753, 758-60 (10th Cir. BAP 2001).

decision in *Lowther* “expressly overruled” the Tenth Circuit’s decision in *Jones*. This court, of course, is bound to follow the Tenth Circuit’s decisions, and is without authority to overrule them. The bankruptcy court properly determined that the Debtor’s obligation falls within the broad general rule established in *Jones*, and does not qualify for the narrow “unusual circumstances” exception applied in *Lowther*.

Conclusion

The bankruptcy court’s judgment declaring that the Debtor’s obligation to the Appellee is nondischargeable as child support under § 523(a)(5) is affirmed.